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November 1, 1993

The Honorable James H. Quello
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Limitations On Commercial Time On Television Broadcast Stations, MM Docket No. 93-254

Dear Mr. Chairman:

We write to ask that you supplement the Commission's pending Notice of Inquiry on television commercial time limits ("NOI") issued on October 7, 1993. As the Commission is aware, the NOI examines the changing public interest standards with regard to commercialism. It asks whether that interest will be served by reestablishing commercial limits on television broadcast stations. The NOI also seeks comment on the effect of any such proposed limits on program length commercials and infomercials.

There are two related petitions which have been pending for two and four years respectively without even initial Commission action. If only as a matter of managerial efficiency, not to mention fairness and responsive government, we believe that you should supplement the NOI in MM Docket 93-254 to seek comment on these two petitions.

In light of the foregoing, we respectfully request that the Commission supplement the NOI to seek public comment on these petitions: (1) the Petition To Amend The Television Sponsorship Identification Rules By Rescinding The Waiver Of Identification Requirements With Respect To Feature Motion Picture Films Produced Initially And Primarily For Theatre Exhibition, ("Motion

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Picture Petition"); and (2) the Petition For Declaratory Relief Regarding Sponsorship Identification Announcements For Infomercials Which Do Not Comply With The Requirements Of The Communications Act ("Infomercial Petition"). The Motion Picture Petition was filed on March 29, 1989, by the Center for Science in the Public Interest, the National Council on Alcoholism, Doctors Ought to Care, Inc., Kathryn C. Montgomery, Ph.D., and Siva K. Balasubramanian, Ph.D. The Infomercial Petition was filed on January 3, 1992, by the Center for the Study of Commercialism, the Center for Media Education, the Consumer Federation of America, and the Telecommunications Research and Action Center.

The Motion Picture Petition requests that the Commission examine the waiver of the sponsorship identification rules afforded motion pictures originally produced for theaters, and later rebroadcast on television. Originally, Congress passed the sponsorship identification law to alert viewers when products were favorably mentioned on television in exchange for money. The Commission exempted movies from these requirements (47 C.F.R. §§73.1212(h), 76.221(g)) in 1960 because at that time there was no evidence that the motion picture industry accepted money from manufacturers in exchange for favorable use of products. However, the Commission said it would reconsider the waiver if circumstances changed.

The Motion Picture Petition asks that the Commission reconsider the exemption for televised motion pictures in light of changed circumstances. It shows that by 1989, it had become common practice for manufacturers to pay large sums of money, or provide valuable nonmonetary services, to get preferential placement of their products in movies. This practice has turned into a big business which continues today. For example, the October 29, 1993, issue of Entertainment Weekly describes how Taco Bell received a prominent placement in the movie "Demolition Man" in return for promoting the movie. Another recent example was the use of Red Stripe beer in the movie "The Firm." According to the July 8, 1993, issue of the Wall Street Journal, Red Stripe gave $5000 in beer to the film crew for that placement. The portrayal of such products in movies in exchange for consideration is a form of "hidden commercialism," and viewers should be warned that they are watching paid advertisements for the products. The current NOI provides the Commission an excellent opportunity to solicit comments on whether the exemption from sponsorship identification for motion pictures continues to serve the public interest.

The Infomercial Petition argues that infomercials, in their present form, are deceptive because they do not provide adequate sponsorship identification information. It appears that

under current FCC and FTC regulations, sponsors need only identify the shows as infomercials infrequently during the broadcast, often only at the beginning, and sometimes prior to each ordering opportunity. However, absent a continuous sponsor identification message, viewers may be deceived into believing the infomercials are news or entertainment programming. For example, a recent Bell Atlantic infomercial even simulates a situation comedy. Action by the FCC is necessary to ensure such identification is provided because FTC enforcement in the area deals only with the deceptive claims concerning the products themselves, not the deceptive nature of the programming. In addition, industry self-regulation has not achieved an acceptable level of sponsorship identification.

In the nearly two years since the Infomercial Petition was filed, the problems with the deceptive nature of infomercials has not abated. In fact, the industry has grown immensely. According to an article in the October 25, 1993, issue of Broadcasting & Cable magazine, infomercials will sell between $750 million and $900 million worth of merchandise this year. Today, infomercial companies buy 70% of their media time from broadcast as opposed to cable stations. Broadcasting & Cable also reports that: nine out of ten broadcast stations currently accept infomercials; 50% of broadcast stations are airing more infomercials now than they did in 1990; and 25% of television stations air infomercials in daytime, while 15% admit to airing infomercials in prime time.

The growth spurt of the infomercial industry makes Commission action on infomercials warranted now more than ever. Because the future of infomercials is closely linked with the Commission's decision to reimplement commercial limits on broadcast stations, the current NOI should be expanded to include comments on the adequacy of sponsorship identification for infomercials.

The NOI in MM Docket 93-254 provides a logical and efficient situation for soliciting comments on the issues raised in these petitions. We therefore request that the Commission amend the NOI to seek public comment on both of these petitions. The Commission should reissue the amended NOI and should extend the

comment deadline to provide an adequate amount of time for commenters to respond. If the Commission fails to act on this request, we will consider taking other action to elicit a response on the two petitions.

Respectfully submitted,

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On Behalf Of:

Center for Science in the Public Interest
Center for the Study of Commercialism
National Council on Alcoholism
Center for Media Education
Consumer Federation of America
Telecommunications Research and Action Center

Enclosures

cc: The Honorable Andrew C. Barrett
The Honorable Ervin S. Duggan
Mr. Paul R. Gordon
Docket No. 93-254

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Petition to Amend the Television Sponsorship Identification Rules By Rescinding the Waiver of Identification Requirements With Respect to Feature Motion Picture Films Produced Initially and Primarily for Theatre Exhibition	Docket No. _____

CENTER FOR SCIENCE IN THE PUBLIC INTEREST

and, as co-petitioners,

NATIONAL COUNCIL ON ALCOHOLISM

DOCTORS OUGHT TO CARE, INC.

KATHRYN C. MONTGOMERY, PH.D.

SIVA K. BALASUBRAMANIAN, PH.D.

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Center for Science in the
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EXECUTIVE SUMMARY

The Center for Science in the Public Interest (CSPI) is a non-profit organization concerned about effects of advertising on consumer health and welfare.

CSPI petitions the Federal Communications Commission to amend its regulations concerning the requirement in section 317 of the Communications Act of 1934 that "all matter broadcast" on television in exchange for valuable consideration be announced as paid for or furnished. Currently, this disclosure requirement is waived for motion picture films produced initially for theater exhibition, even though such films are usually broadcast at a later time. We request that this waiver be rescinded and that the Commission apply disclosure requests to motion picture films broadcast on television. (47 C.F.R. §§73.1212(h), 76.221(g)).

In 1960, Congress amended section 317 of the Act to clarify the prohibition against "payola," i.e., favorable product mentions on television given in exchange for undisclosed consideration furnished by product manufacturers. During the rulemaking proceeding implementing this amendment, the Commission emphasized that the statute covers televised feature films. However, the Commission waived sponsorship announcements with respect to such films because it lacked evidence that the motion picture industry was engaging in "payola" or similar practices. The Commission said it would promptly reconsider the waiver if circumstances changed.

The waiver is no longer in the public interest because

circumstances have indeed changed. Placement of brand name products in Hollywood motion pictures in exchange for consideration is now a highly-developed industry. Manufacturers pay money, provide goods, and furnish promotions of films in exchange for having their products and brands depicted. Later television exposure is a key part of this new form of payola and editing for T.V. does not eliminate product placements from broadcasts.

Today's product placements, intended to persuade unsuspecting audiences, violate the principle in section 317 of the Act that the public has the right to know who is trying to persuade it. Many techniques used in today's feature films that are later broadcast on television correspond to specific examples of practices that Congress and the Commission have said trigger disclosure requirements.

Placements of alcoholic beverages and cigarettes especially violate the public interest by encouraging young people to emulate film heroes who use these products without ill effects. Favorable depictions of these products evade voluntary industry policies against advertising alcoholic beverages to youths, and the placement of cigarettes in movies may violate the Cigarette Labeling and Advertising Act which prohibits advertising of cigarettes on television.

The long-standing requirement for other television programs -- one sponsorship announcement any time during the broadcast --is inadequate to disclose paid product placements in televised

feature films. This requirement does not take into account factors which make it particularly difficult for viewers of televised movies to identify hidden ads. Motion pictures are longer than most television programs, have longer credits, are disproportionately viewed by young people, and have long been viewed in a theatre setting which reinforces the illusion that they are entirely separated from commercial material. Thus, the Commission should require a conspicuous disclosure every time a paid product placement is depicted.

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March 29, 1989

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

PETITION TO AMEND THE TELEVISION SPONSORSHIP IDENTIFICATION RULES BY RESCINDING THE WAIVER OF IDENTIFICATION REQUIREMENTS WITH RESPECT TO FEATURE MOTION PICTURE FILMS PRODUCED INITIALLY AND PRIMARILY FOR THEATRE EXHIBITION

The Center for Science in the Public Interest (CSPI)[1] submits this petition to the Federal Communications Commission under Sections 317 and 507 of the Communications Act of 1934, 47 U.S.C. §§ 317, 508; Section 4(d) of the Administrative Procedure Act, 5 U.S.C. § 553(e); and Sections 1.401, 73.1212 and 76.221 of Title 47 of the Code of Federal Regulations. We request that the Commission rescind its waiver, with respect to films made initially and primarily for theater exhibition, of the sponsorship

[1] CSPI is a non-profit consumer health advocacy organization with more than 150,000 members nationwide. Since its founding in 1971, CSPI has been concerned about the effects of advertising on public health. Co-petitioner National Council on Alcoholism is the oldest and largest voluntary health organization combating alcohol and other drug problems in the nation. Co-petitioner Doctors Ought to Care, Inc., is a physician-led organization representing over 6,000 physicians and medical students, working with young people in major preventable causes of ill health, specifically tobacco, alcohol, and poor nutrition. Co-petitioner Kathryn C. Montgomery, Ph.D., is Professor of Television Studies at the University of California, Los Angeles, and is an expert on television industry practices and communications public policy issues. Co-petitioner Siva K. Balasubramanian, Ph.D., is Assistant Professor of Marketing at the University of Iowa College of Business Administration, and is concerned about the impact that public policies on television advertising have upon consumer interests.

identification requirements that apply to all other broadcast and origination cablecast television programming.

We specifically petition the Commission to:

(1) delete subsections 73.1212(h) and 76.221(g) in Title 47 of the Code of Federal Regulations.

(2) amend subsections 73.1212(f) and 76.221(e) of C.F.R. Title 47 to require more conspicuous announcements of sponsored material in televised "feature" films than the Commission currently requires regarding other television programming, so that this provision reads as follows:

> "Except with respect to feature motion picture film produced initially and primarily for theatre exhibition, in the case of broadcast [origination cablecast] matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need by made at any time during the course of the broadcast. With respect to such motion picture film, such an announcement shall be deemed sufficient for purpose of this section only if it appears for the duration of each time that the sponsored material appears on the screen."

INTRODUCTION

The Communications Act of 1934 (the Act) requires sponsorship identification for all products that appear on television in exchange for payment to the broadcast licensee or other individual who causes such product to be part of such programming. 47 U.S.C. {{ 317, 508. "Payola" practices in the broadcast industry prompted Congress, in 1960, to amend the Act to require

sponsorship identification for "all matter broadcast," and to authorize the Commission to promulgate appropriate regulations. 47 U.S.C. { 317. However, in 1963 the Commission waived this provision with respect to telecasts of "feature motion picture film produced initially and primarily for theatre exhibition" (hereinafter "feature" films). [47 C.F.R. § 73.1212(h). The Commission did so because it found "nothing which would indicate that the theatrical motion picture industry has engaged in practices which were felt to be contrary to the public interest as it relates to broadcasting . . ." Report and Order, Amendment of Sponsorship Identification Rules, 34 F.C.C. 829, 841 (May 1, 1963).]

With the help of "product placement" companies, which specialize in finding appropriate films for clients' brand-name products, product "advertisements" in return for payment of money or other valuable consideration have recently proliferated in "feature" films. Even without the aid of such companies, many brand-name products now find their way to Hollywood in return for money, goods, or services furnished to filmmakers.

When the Commission waived sponsorship identification requirements for "feature" films, it acknowledged its statutory authority to regulate those films which are ultimately broadcast on television, 34 F.C.C. at 835, which today includes most such films. Thus, the Commission has authority to require sponsorship identification in all movies at the time they are broadcast on TV.

In its report supporting the waiver, the Commission

emphasized that it intended to "maintain a careful and con... surveillance of industry practices;" and to take "whatever ... is deemed necessary as a result of future developments." ... 842. Action by the Commission is now called for because ... the "payola" practices which Congress sought in 1960 to preven... in the broadcast industry are now rampant in the movie industry. Thus, the Commission rationale for a waiver is no longer valid. Since Congress has determined that "payola" practices are not in the public interest, and the Commission has acknowledged its ... authority to regulate "feature" films ultimately shown on television, the Commission should amend its regulations to rescind the waivers in 47 C.F.R. §§73.1212(h) and 76.221(g) of sponsorship identification requirements for telecast "feature" films.

STATEMENT OF FACTUAL AND LEGAL GROUNDS

I. ANNOUNCEMENTS ARE GENERALLY REQUIRED OF SPONSORSHIP FOR "ALL MATTER" THAT IS BROADCAST IN EXCHANGE FOR VALUABLE CONSIDERATION.

A. The statutory requirement

Disclosures of payment for promotion of products on radio or television are governed by Section 317 of the Communications Act of 1934 as amended, 47 U.S.C. § 317 which provides that:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a

broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(b) In any case where a report has been made to a radio station, as required by section 508[2] of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

* * *

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

These amendments (Pub.L. 86-752, §8(a), 74 Stat. 895 (1960) were designed to protect the public against growing "payola" practices in the broadcast industry, whereby radio announcers, television game show hosts, and others received payment in return for the use of certain products on their programs.

The purpose of sections 317 and 508 is to prevent "hidden sponsorship." In Re General Media Associates, Inc., 3 F.C.C. 2d 326, 327 (1966). The regulatory concern reflected is that

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[2] 47 U.S.C. §508 (formerly Section 508 of the Act, now redesignated Section 507) requires station employees to disclose to their station any valuable consideration they accept or agree to accept for the broadcast of any matter. This section provides the vehicle which was "needed to provide licensees with the information whereby compliance with the requirements of section 317(b) could be effected." FCC Report and Order, 34 F.C.C. 829, 837 (1963). In its report, the Commission discussed the relationship between sections 317 and (then) 508, and concluded that they should be read together to require disclosure of certain information by licensees, licensee employees, program producers, and all other individuals connected to the production of television programming. Id.

"commercial material, regardless of the audience to which it is directed, is identified sufficiently to avoid deception." In Re Complaint of Action for Children's Television, F.C.C. #85-180, Mimeo 35680 (May 1, 1985), paragraph 15.

B. The Commission's regulations and waiver

To implement the 1960 amendments, the Commission issued regulations prescribing disclosures. The pertinent current regulations for television broadcast stations (47 C.F.R. § 73.1212) and for cable television systems engaged in origination cablecasting (47 C.F.R. § 76.221) are identical in substance. The regulation governing broadcast stations generally provides that:

> (a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied: Provided, [same proviso as in statute].
>
> * * *
>
> (e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised,
>
> * * *
>
> (f) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section.

47 C.F.R. § 73.1212 (1987). Cf. §76.221 (a), (d), (e) (1987).

However, the regulation contains the following exception, adopted under the waiver provision of §317(d) of the Act:

> (h) Any announcement required by section 317(b) of the Communications Act of 1934, as amended, is waived with respect to feature motion picture film produced initially and primarily for theatre exhibition.

47 C.F.R. § 73.1212. Cf. §76.221 (g).

Thus, television broadcasting stations and cable systems ordinarily must clearly identify sponsored products and the companies which provided them. An announcement is required at some time during the broadcast, stating that the product promotion was made in return for some form of consideration. The requirement is waived, however, with respect to "feature" films made initially for theater exhibition and only later broadcast on television.

II. GROUNDS NO LONGER EXIST FOR EXEMPTING TELEVISED "FEATURE" FILMS FROM THE REQUIREMENT OF SPONSORSHIP ANNOUNCEMENTS.

The Commission first waived sponsorship identification requirements for broadcasts of "feature" films in the 1963 amendments to 47 C.F.R. § 73.654, the predecessor rule to current

§ 73.1212.[3] At that time the Commission issued two critical documents: a Report and Order analyzing the sponsorship identification issue with respect to the motion picture industry and stating the reasons for the waiver,[4] and a Public Notice adopting 27 "illustrative interpretations" contained in a House committee report that stated the intended effect of the 1960 amendments to the Act.[5] The Commission was convinced, as a matter of law, that section 317 of the Act covered television broadcasts of "feature" films. However, the Commission chose to waive sponsorship identification requirements for such broadcasts because it believed that, in fact, the undisclosed advertising practices that gave rise to the 1960 amendments were not taking place in the motion picture industry. Because such practices are pervasive in that industry today, the factual basis for that waiver has vanished.

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[3] In 1975, the Commission issued a Report & Order (Docket No. 19513) in conjunction with a rule which amended and consolidated all rules concerning sponsorship identification. No substantive changes were made concerning any of the issues addressed in this petition. 47 C.F.R. § 73.1212 (effective May 30, 1975 and amended in 1981, 1984, and 1985) continues to control sponsorship identification for broadcast stations, while 47 C.F.R. § 76.221 (effective April 28, 1974 and amended in 1977) regulates cable systems.

[4] 34 F.C.C. 829 (1963). In a footnote, the Commission stated that for purposes of the report and order, it would refer to films made for theatre exhibition as "feature" films so as to distinguish them from "syndicated" films produced expressly for television broadcast. 34 F.C.C. at 835. This petition will employ the same language.

[5] 40 F.C.C. 141, 144-52 (1963), citing H.R. Rep. 1800, 86th Cong., 2d Sess. 20-24 (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3528-3532.

A. The Commission has clear statutory authority over broadcasts and cablecasts of "feature" films.

In 1963, the Commission carefully asserted its authority to regulate "all matter broadcast," including "feature" films that are eventually shown on television. As initially proposed, the amended regulations to reflect the 1960 statutory amendments would have included the following:

> Any films broadcast by any television station which were photographed for commercial exhibition after the effective date of this subsection shall, in the absence of an adequate showing to the contrary, be presumed to have been intended for television exhibition.

26 Fed. Reg. 3,781, 3,782 (1961). Although it deleted this provision in the final rule, and granted the waiver, the Commission specifically rejected the argument that the statute did not cover broadcasts of "feature" films, saying:

> [w]e wish to emphasize that we are fully convinced that such program matter does come within the terms of sections 317 and 508, and that our authority to promulgate rules requiring sponsorship identification announcements as to this type of program matter is likewise clear.

34 F.C.C. at 835. (emphasis added). Moreover, the Commission reserved its rulemaking authority should it decide

> "at some future date that the public interest requires a withdrawal of the waiver because of subsequent developments."
>
> Id.

The Commission emphasized that section 317 applies to all program matter which is broadcast, "regardless of the intent of the producer at the time the program was produced." Id. at 837. That interpretation is supported by the language of section

317(a)(1) which covers "all matter broadcast," and by 317(b) which extends the statute to situations where consideration is received by one other than a broadcast licensee "under circumstances which would have required a sponsorship identification announcement had the licensee received the consideration." Id. at 836.

The Commission also found no basis in the legislative history for distinguishing between "syndicated" films (those made exclusively for television broadcast) and "feature" films. In fact, the Commission stated that:

> the purpose for the enactment of section 317 was to inform the listening public by whom it was being persuaded: the sole test as to whether a sponsorship identification was required was whether there had been broadcast exposure in return for the payment of 'any money, service, or other valuable consideration' -- if there was such an exposure, section 317 applied and an announcement as to the identity of the sponsor was required.

34 F.C.C. at 836 (quoting "Sponsorship Identification on Broadcast Stations," 6 Pike & Fischer R.R. 835; Report to the President by the Attorney General on Deceptive Practices in the Broadcasting Media, 19 Pike & Fischer R.R. 1901, 1909-1910). In its exhaustive examination of the legislative history, the FCC found nothing which "excludes films not produced exclusively for television from the requirements of section 317, nor do any of the 27 examples in the House report exclude such films." Id. A recent judicial interpretation, moreover, holds that Congress intended the all-encompassing plain words "all matter broadcast" to mean "precisely what they say." National Ass'n for Better Broadcasting v. F.C.C., 830 F.2d 270, 275 (D.C. Cir. 1987).

Thus, nothing in the language or legislative history of the 1960 amendments warrants excluding "feature" films from the scope of "all matter broadcast" in sections 317 and 508. Congress intended such films to be covered, absent a waiver granted by the Commission.

In 1963, the Commission also carefully rejected industry's argument that many feature films are not, in fact, intended for broadcast. The Commission noted that:

> [I]t has been conceded by representatives of the motion picture industry that broadcast use may be one of the considerations in the production of 'feature' films. Moreover, the economic facts of life of the motion picture industry today dictate that one of the principal purposes of film production is for broadcast exhibition, ...

34 F.C.C. 829, 838. (1963). The Commission also recited statistics on actual broadcast of recent "feature" films and other evidence of the movie industry's interdependence with television. See generally 34 F.C.C. at 838-41, paragraphs 24-32. "That the great majority of 'feature' films made today will, within a relatively short time after production, be exhibited on television," the Commission concluded, "is an undeniable reality."

> To conclude, in light of this reality, that 'feature' films are not intended for broadcasting would be to close our eyes to the facts and realities of today's economic life.

Id. at 841.

What was true about interdependence of movies and television in 1963 is even more true today. Often it is only a matter of months before "feature" films appear on television. It is clear that motion picture producers currently make feature-length films

with an eye towards revenues from television broadcast. In effect, then, the FCC has authority to regulate sponsorship identification in virtually all movies produced today.

B. The waiver was granted only because, in 1963, the Commission lacked evidence of undisclosed advertising in feature films.

The impetus for amending section 317 and its implementing regulations was the discovery of "payola" practices in the broadcast industry. The Commission's 1963 Report and Order discussed these practices and noted that they had led both Congress and the Commission to "question whether such practices constituted or induced violations of section 317 of the Communications Act." 34 F.C.C. at 830. Following its earlier investigation of the matter, in 1960 the Commission had issued a public notice entitled "Sponsorship Identification of Broadcast Material" (FCC 60-239). Id. The Commission found many instances where "consideration had been provided in exchange for the broadcasting of various types of material without an accompanying announcement indicating that consideration had been provided, and by whom, in exchange for, or as an inducement for the particular broadcast." Id. Noting that consideration may take a variety of forms, the Commission also stated that section 317 required sponsorship announcements in all cases where payment is made in exchange for promotion of a product.

The Commission waived sponsorship identification requirements for "feature" film telecasts only because the information before it in 1963 did not indicate that the motion

picture industry was engaging in the activities that the amendments to section 317 aimed to prevent: undisclosed payments for the promotion of products. The Commission stated that:

> Our prior experience with respect to the administration and enforcement of section 317, of course, contains nothing which would indicate that the theatrical motion picture industry has engaged in practices which were felt to be contrary to the public interest as it relates to broadcasting and to be in direct opposition to the right of the public to know the identity of those who are attempting to persuade it through broadcast programs. . . .
>
> . . . [T]here is no evidence before us which tends to establish that any practices in this regard prevail in this industry which improperly affect broadcasting. . . .

34 F.C.C. at 841 (emphasis added).

The Commission simply found it unnecessary to impose a rule to prevent practices where they did not exist. However, the Commission stated it would promptly reconsider the need for such a rule if circumstances changed:

> In adopting this course, we wish to emphasize our intention to maintain a careful and continuing surveillance of industry practices; additionally, attention will also be given to the continued operation and development of the theatrical motion picture industry to determine whether the adoption of the proposed rule or some other appropriate rule might subsequently become necessary. Our authority being clear in this regard, we will be prompt in taking whatever action is deemed necessary as a result of future developments.

Id. at 842 (emphasis added).

C. Undisclosed advertising is pervasive in feature films today.

Changed circumstances now warrant eliminating the waiver for feature films. To use the Commission's language from 1963, the

"continued operation and development" of the film industry during the 1980s shows ample evidence of practices that "improperly affect broadcasting" and that section 317 seeks to prevent. The pervasive undisclosed advertising in feature films today in general, and some of the harmful messages conveyed in particular, are "contrary to the public interest." Cf. 34 F.C.C. at 841-42.

Product manufacturers[6], movie studios[7], and the companies who act as product placement intermediaries[8] all acknowledge that

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[6] See Philip Morris Magazine (Winter, 1987), p. 23, (Exhibit 1, attached), ("It is no coincidence that one manufacturer's ice cream,car, clothing, computer, cola, cosmetics, stereo, cigarette, beer, etc. is displayed exclusively in any given film. Featuring a particular brand name throughout a film is a significant and rapidly growing source of revenue for filmmakers."); Letter from Alan G. Easton, Vice President-Corporate Affairs for Miller Brewing Company, to Mr. Joe B. Tye, Stop Teenage Addiction to Tobacco, March 3, 1987 (Exhibit 2) ("Miller Brewing does retain agents who are responsible for arranging for the placement of product in movies. . .").

[7] See Cannon, "A Word From the Sponsor: Matthau's Nikon Goes Clink, Clink," Los Angeles Times, May 11, 1982, Business pp. 1,5 ("Bill Minott[sic], director of national promotion for 20th Century-Fox, [says] "It is like one-stop shopping. It's a significant money and time saver in both the production of a film."); Letter from William Minot to Robert Kovoloff, Associated Film Promotions, March 17, 1983 (Exhibit 3) ("You have led the way in expediting efficient services to film productions both here in Hollywood and throughout the world. This expertise combined with the ability to establish promotional relationships between corporate clients and the film community give us another channel for the distribution phase of our business.").

[8] See L.A. Times, supra n. 7, (Robert Kovoloff of Associated Film Promotions said in 1982 that he handled product placement in movies for 170 brands by 60 manufacturers, and looked at 170 scripts and worked on 120 films in 1981); Grove, "The economics of using the real thing," Los Angeles Herald Examiner, Sept. 13, 1979, p. A14 (Kovoloff says "We can now put 15 or 20 items into some films."); Goodman, "Zooming on the $million," PR Week, May 16-22, 1988, pp. 10-11 (Frank Devaney, corporate vice president and product placement point man at Rogers & Cowan, "says he regularly goes through scripts looking for the opportunities that

name-brand products now frequently appear in feature motion pictures in return for some form of valuable consideration. As early as 1982, major news reports labeled this practice "big business"[9] and "an organized process."[10] In some instances, manufacturers pay studios "promotional consideration" of up to a half-million dollars.[11] More typically, manufacturers provide their products to the studios through companies that specialize in persuading filmmakers to place products in the movies, in the light most favorable to the products. Such companies are paid retainers often exceeding tens of thousands of dollars.[12] Scenes

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made the Reese's Pieces placement [in "E.T."] so lucrative."); Dougherty, "Diener Builds Ties to Movies," New York Times, Oct. 29, 1985, p. D25 (West Coast president of Diener/Hauser/Bates, which had just formed a Motion Picture Product Placement and Promotion Division, believed that product placement business had grown rapidly in the previous eight years.)

[9] L.A. Times, supra n. 7.

[10] Maslin, "The Art of Plugging Products in the Movies," The New York Times, Nov. 15, 1982, p. C11.

[11] PR Week, May 16-22, 1988, supra n. 8, at 11. See also Dorman, "Focus on Product Placement," The Hollywood Reporter, June 2, 1987, p. S-15 (". . .[T]here are occasions where a production may earn fees to be applied against production costs. An advertiser will normally only pay fees for exceptional primary exposure opportunities: the star using the product; verbal mention of the product name; a significant portion of a brand's commercial is shown on-screen.")

[12] "Placing Product With a New York Accent," The Hollywood Reporter, June 2, 1987, p. S-24 (Advertising in Movies charges clients average annual retainer of $50,000 for a guarantee of placement in six films); Gallo, "Lights, cameras . . . Cokes!," New York Daily News, Mar. 28, 1985, p. 81 (F.S. Cameron Co., New York, charges firms $25,000 per year for guarantee of placement in five films); Sansweet, "Why Marlon Brando Passed to Milk Duds to George C. Scott," Wall Street Journal, May 24, 1982, p.1 (in May, 1982, Associated Film Promotions' (AFP's) annual fee ranged from $25,000 to several hundred thousand dollars, also for a